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Before The  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

MAR 17 1995

Satellite and Radiocommunication Division  
Office of the Chief

In re Application of )  
)  
CONSTELLATION )  
COMMUNICATIONS, INC. )  
)  
For Authority to Construct, )  
Launch and Operate a Low-Earth )  
Orbit Satellite System in the )  
1.6/2.4 GHZ Bands )  
\_\_\_\_\_ )

File Nos. 17-DSS-P-91(48)  
and CSS-91-013  
9-SAT-LA-95  
10-SAT-AMEND-95

To: Chief, International Bureau

OPPOSITION TO PETITION FOR RECONSIDERATION

Pursuant to Section 1.106(g) of the Commission's Rules [47 C.F.R.

§ 1.106(g)], Loral/QUALCOMM Partnership, L.P. (LQP), hereby submits its

Opposition to the Petition for Reconsideration filed by Constellation

Communications, Inc., on March 2, 1995.<sup>1</sup> In its Petition, Constellation requests

<sup>1</sup> On January 31, 1995, LQP was granted an authorization to construct, launch and operate a low-earth orbiting satellite system, which would compete with that proposed by Constellation. Order and Authorization, DA 95-128 (released Jan. 31, 1995). LQP has a substantial interest in action on Constellation's Petition. LQP petitioned to deny Constellation's amended MSS application on the grounds that Constellation's financial showing did not establish that it is financially qualified and that the substantial change in ownership of Constellation is a major amendment which requires that its application be deemed "newly filed" under the Commission's Rules for processing satellite applications. See LQP's Petition to Deny (filed Dec. 22, 1994). The Bureau agreed with LQP on the first point. On the second, it concluded that Constellation's ownership changes did not require processing as a "major amendment." On March 2, 1995, LQP filed an Application for Review of that decision.

that the International Bureau reconsider the finding that Constellation has failed to establish its financial qualifications to obtain an authorization in the MSS Above 1 GHz service at this time. Order, DA 95-129, ¶¶ 5-16 (released Jan. 31, 1995).

Constellation claims that the Bureau's analysis was based on a newly created and procedurally defective "rule" concerning what constitutes a management commitment for purposes of meeting the Big LEO financial standard, see 47 C.F.R. § 25.143(b)(3), and also failed to consider relevant matters in Constellation's financial showing. To the contrary, as explained below, the Bureau correctly analyzed Constellation's financial showing based on long-standing and well-known applications of rules in the satellite service concerning financial commitments and supporting documentation. Moreover, taken together, Constellation's documentation does not support the conclusion that Constellation meets the financial standard as a matter of either fact or law. Accordingly, Constellation's Petition for Reconsideration should be denied. Further action on its application should be deferred consistent with the Order.

I. THE BUREAU'S DECISION TO DEFER CONSTELLATION'S APPLICATION WAS BASED ON ESTABLISHED POLICIES APPLYING THE COMMISSION'S DOMSAT FINANCIAL STANDARD.

Pursuant to the Commission's financial standard for the 1.6/2.4 GHz MSS service, Constellation is required to demonstrate the current availability of committed, noncontingent funds sufficient to meet "the estimated costs of the

"construction and launch of all proposed space stations in the system and the estimated operating expenses for one year after the launch of the initial space station." 47 C.F.R. § 25.143(b)(3); see Domestic Fixed Satellite Service, 58 RR 2d 1267, 1270-73 (1985), recon. denied, 61 RR 2d 992 (1986). Applicants relying on internal financing -- as Constellation claims to do -- must demonstrate "current assets or operating income sufficient to cover system costs," Big LEO Report & Order, 9 FCC Rcd 5936, ¶ 31 (1994), and must submit "evidence of a management commitment to the proposed satellite system." 47 C.F.R. § 25.143(b)(3).

In its November 16, 1994 amended application, Constellation submitted letters from Bell Atlantic Corporation, an 8% shareholder, and E-Systems, Inc., a 30.7% shareholder, in connection with its financial showing. On January 3, 1995, it submitted affidavits from each company in response to petitions to deny its application filed by LQP and other Big LEO applicants. Constellation claims that Bell Atlantic and E-Systems are corporate "parents" and therefore this material represents financing from internal sources.<sup>2</sup> See Petition, at 4.

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<sup>2</sup> Contrary to Constellation's unsupported claim (Petition, at 3), the Bureau did not decide that its minority shareholders Bell Atlantic (8%) and E-Systems (30.7%) qualified as "parents" for purposes of Section 25.140(d)(1). Indeed, the Bureau stated that "Bell Atlantic and Constellation do not have the same commonality of interest" as would a majority shareholder and a subsidiary. Order, ¶ 15 (footnote omitted). As the Bureau points out, a majority shareholder can provide the necessary unconditional "management" commitment for an applicant because it is in a position to control the expenditure of funds. Id. This is not necessarily the case for the two minority shareholders, unless they control the applicant -- which Constellation vigorously denies. See Opposition, at 21-24 (filed Jan. 3, 1995). Constellation's financial showing is thus premised on a flawed assumption that these two minority shareholders can act as corporate "parents." At the least, the Bureau decided that a commitment from a minority shareholder

Constellation claims that the language of the letters from both Bell Atlantic and E-Systems was based on a management letter which had been deemed to meet the DOMSAT standard in National Exchange, Inc., 3 FCC Rcd 6992 (1988) ("NEX"). See Petition, at 4. However, the Bureau properly found that the Bell Atlantic letter is insufficient based on multiple deficiencies from the Commission's DOMSAT financial standard.<sup>3</sup> Constellation now claims that the Bureau's decision elevated the language of the NEX letter to the status of a "rule" without the necessary notice-and-comment rulemaking proceeding.

Constellation's argument is wrong for two reasons.<sup>4</sup> First, the deficiencies which the Bureau identified arise from long-standing applications of the DOMSAT

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must be scrutinized more strictly. See Order, ¶ 15 ("the tentativeness of Bell Atlantic's commitment is particularly significant given Bell Atlantic's relatively small equity interest in Constellation"). But, without regard to this issue, the Bell Atlantic and E-Systems documents do not provide the management commitment required by the DOMSAT financial standard, as discussed in the text.

<sup>3</sup> The documents concerning E-Systems which Constellation provided indicate that it lacks financial resources sufficient to meet Constellation's estimated costs. See Order, ¶ 16 & n.14. Therefore, Constellation must rely on the Bell Atlantic letter for its "management commitment." Its reliance is, however, misplaced, as the Bureau correctly found. See Order, ¶¶ 13-16.

<sup>4</sup> Constellation's argument is also internally inconsistent. On the one hand, it claims that its financial showing is sufficient based on criteria established by the approval of the NEX letter. On the other hand, it argues that the Bureau erred by using the NEX letter to illustrate the criteria necessary to meet the financial standard. Constellation cannot have it both ways. In any event, the essence of the Bureau's rationale is that Constellation's financial showing fails because it does not establish the present, noncontingent commitment of funds which the NEX letter was found to meet and the DOMSAT standard requires. As the Bureau aptly noted: "Having found it necessary to add words of equivocation, neither Bell Atlantic nor Constellation can reasonably complain if we take them seriously." Order, ¶ 14.

standard and therefore do not constitute a new rule or policy. Second, in any event, the Bureau did not use the language of the NEX letter as "rule" but rather to demonstrate by comparison that Bell Atlantic's letter was not, as Constellation claimed, identical to and as sufficient as the letter in NEX.

With regard to the first point, the Bureau found that the Bell Atlantic letter did not (1) demonstrate a final, irrevocable commitment, (2) specify the amount of Bell Atlantic's commitment, (3) preclude contingencies on the alleged commitment, or (4) demonstrate Board approval which the letter indicated may be necessary. Order, ¶ 13. In reaching these conclusions, the Bureau recognized that differences in language between the NEX and Constellation letters illustrated failings in the alleged commitment. Id. The Bureau thus did not create new policy in this analysis, but rather, recognized deficiencies consistent with known policies regarding application of the Commission's DOMSAT financial standard:

(1) Lack of Irrevocable Commitment. The Bell Atlantic letter stated that the company had completed only an "initial review" of Constellation's plans. Under the Commission's DOMSAT standard, no commitment can be found where the arrangements have not gone beyond "the preliminary planning steps." Equatorial Communications Services, 103 FCC 2d 631, 633 (1985).

(2) Failure to Specify Amount of Commitment. The expressed intent of the Bell Atlantic letter is not to provide financing for the construction, launch and operation of Constellation's system, but rather merely "to provide financial support for that satellite project" without specifying the extent of its support. In Orion

Satellite Corp., 5 FCC Rcd 4937, 4941, ¶ 31 (1990), the Commission found insufficient a commitment letter which failed to indicate how much equity would be committed toward the proposed satellite system.

(3) Contingencies on Commitment. The Bell Atlantic letter explicitly states that the purported commitment is "subject to negotiation of satisfactory agreements." The Commission has long recognized that "unmet conditions are inconsistent with the Commission's noncontingent financial standard." Orion Satellite Corp., 5 FCC Rcd at 4941, ¶ 31 (finding four commitment letters inadequate to demonstrate financing where the letters contained conditions requiring further actions by the parties and there was no indication that the conditions had been met).

(4) Failure to Demonstrate Approval of Commitment. The Bell Atlantic letter is expressly conditioned on obtaining approval of the company's Board of Directors "if applicable." Where letters state that approval of higher authorities must be obtained, and that approval process has not been completed, the Commission does not consider that a commitment has been made. See National Exchange, Inc., 103 FCC 2d 836, 838-39 (1985) (an earlier decision finding NEX's financial showing inadequate for grant at that time).

Thus, contrary to Constellation's Petition, these defects do not arise because the language of the NEX letter was adopted as a new rule for commitment letters. Rather, the Bureau found that the Bell Atlantic letter is inconsistent with the Commission's well-known and well-established policies concerning how to apply

the DOMSAT standard. This then is not a situation like those cited by Constellation in which the Commission adopts a standard where previously there was none. Cf. Glaser v. FCC, 20 F.2d 1184 (D.C. Cir. 1994) (FCC's decision to apply without prior notice the "hard look" policy adopted for competing applications for vacant FM frequencies to applications in comparative renewal proceeding violated Administrative Procedures Act). The principles to be applied to Constellation's application were established before the Bureau acted.

Moreover, the Bureau did not elevate the language of the NEX letter to a talismanic standard for all satellite applicants to meet. Constellation itself claimed that the Bell Atlantic letter tracked the text of the NEX letter and that because the NEX letter was sufficient, the Bell Atlantic letter was also sufficient. The Bureau pointed out that the Bell Atlantic letter did not track the language of the NEX letter in certain critical details, and indeed that Bell Atlantic had "modified it in ways that, without exception, introduce contingencies or limitations into language that had contained none." Order, ¶ 14. Constellation itself selected the NEX letter and invoked the comparison to support its argument. The Bureau explained why the comparison failed. In so doing, it did not engage in rulemaking, but rather in the type of reasoned analysis expected of agencies. Accordingly, Constellation's argument is without merit, and its Petition must be denied.

II. THE BUREAU CONSIDERED ALL THE INFORMATION NECESSARY TO FIND PROPERLY THAT CONSTELLATION'S APPLICATION SHOULD BE DEFERRED.

Constellation also claims that the Bureau erred by not finding that the Bell Atlantic affidavit submitted with its January 3, 1995 Opposition, cured any deficiencies in the previously-submitted Bell Atlantic letter. Petition, at 8-10. Even if this affidavit were construed as a supplement to the prior letter, Constellation's financial showing would be inadequate, because the affidavit contains the same flaws as the letter itself.

First, the affidavit provides no amplification of Bell Atlantic's "initial review" of the Constellation project and so does not dispel the preliminary nature of the Bell Atlantic "commitment" identified by the Bureau as a deficiency.

Second, the affidavit, like the letter, does not specify an intent to provide the funds necessary for construction, launch and operating expenses for one year after launch. As Constellation notes (Petition, at 9), the affidavit only states that Bell Atlantic believes it has demonstrated its intent "to provide the necessary financial support for the Constellation LEO system." But, neither the letter nor the affidavit describes what Bell Atlantic considers "the necessary financial support," and so, the flaw identified by the Bureau remains.

Third, the affidavit expressly states that any commitment of funds remains "subject to negotiation of satisfactory agreements." Thus, the contingent nature of the Bell Atlantic commitment is reaffirmed rather than cured by the affidavit.

Fourth, the affidavit recites that Board of Directors approval may be a



condition for any commitment of funds. Again, the deficiency identified by the Bureau is reinforced by the affidavit.

Constellation claims now that the contingencies specified in the letter and confirmed in the affidavit simply detail routine corporate processes. According to Constellation, Bell Atlantic has provided more detail on its approval process than did other applicants in letters found sufficient for the financial showings of LQP, TRW Inc. and Motorola Satellite Communications, Inc. Petition, at 10-11. But, the facts in the record do not support this comparison. Even assuming that the contingencies identified by Bell Atlantic were routine, the necessary level of commitment has not been met. Under the Commission's DOMSAT standard, an applicant must demonstrate a present, noncontingent commitment to expend the funds necessary for construction, launch and operations during the first year. The Bell Atlantic letter and affidavit simply do not provide this level of present commitment. The January 3 affidavit does not cure the defects in the Bell Atlantic letter, and the Bureau did not err in deferring Constellation's application.<sup>5</sup>

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<sup>5</sup> And, in any event, Constellation's substantial change in ownership resulted in a "major amendment" to its application which requires that it be placed on Public Notice and considered in a subsequent Big LEO processing group. See LQP's Petition to Deny Constellation's Amended Application (filed Dec. 22, 1994) and LQP's Application for Review of the Order (filed Mar. 2, 1995).

III. CONCLUSION

For the reasons outlined above, Constellation has failed to provide any basis in law or fact for the Bureau to modify its decision regarding Constellation's financial showing. Accordingly, Constellation's Petition for Reconsideration must be denied.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, William D. Wallace, hereby certify that I have on this 15th day of March, 1995, caused copies of the foregoing Opposition To Petition For Reconsideration to be delivered via hand delivery (indicated with \*) or by U.S. mail, postage prepaid, to the following:

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